

Lit

BEFORE THE SHORELINES HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF A SHORELINE
SUBSTANTIAL DEVELOPMENT
CONDITIONAL USE PERMIT
ISSUED BY ISLAND COUNTY AND
DISAPPROVED BY THE STATE OF
WASHINGTON, DEPARTMENT OF
ECOLOGY, TO RICHARD AND
LORRAINE HASTINGS.

RICHARD and LORRAINE HASTINGS.

Appellants,

v.

STATE OF WASHINGTON,
DEPARTMENT OF ECOLOGY, AND
ISLAND COUNTY

Respondents.

SHB No. 86-27

FINAL FINDINGS OF FACT
CONCLUSIONS OF LAW AND
ORDER

THIS MATTER, a request for review of a disapproval of a shoreline conditional use permit came on for hearing before the Shorelines Hearings Board, Wick Dufford, Chairman, and Judith A. Bendor, Nancy Burnett, Tom Cowan, and Ronald T. Bailey, Members, convened at Coupeville, Washington on October 29, and 30, 1987. Lawrence J. Faulk, Member, heard and read the record in this matter. Administrative Appeals Judge, William A. Harrison, presided.

1 Appellants appeared by Douglas Wheeler, Attorney at Law.
2 Respondent Department of Ecology appeared by Jay J. Manning, Assistant
3 Attorney General. Respondent Island County appeared by David L.
4 Jamieson, Jr., Deputy Prosecuting Attorney. Reporter Rebecca Winters
5 reported the proceedings.

6 Witnesses were sworn and testified. Exhibits were examined. From
7 testimony heard and exhibits examined, the Shorelines Hearings Board
8 makes these

9 FINDINGS OF FACT

10 I

11 This matter arises on Whidbey Island on the shore of Holmes Harbor
12 in Island County.

13 II

14 The site in question is known as Dines Point. The name derives
15 from Harry Dines, uncle of the appellant Richard Hastings. Mr. Dines
16 bought the site in 1929, and established a fishing resort there. The
17 resort consisted of 9 or 10 small cabins with a large boat house added
18 later. A bulkhead was constructed along the eastern side of the point
19 to protect against erosion.

20 III

21 Dines Point is what is known as an accretion shore form. This
22 means that long ago it was a spit of land trailing into open water.
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1 In time, wave action deposited sediments causing the spit to accrete,
2 that is, to grow longer. The movement of the currents directed the
3 lengthening spit back on itself in a horseshoe pattern. Eventually,
4 the tip of the spit nearly rejoined the main shore. Thus, the spit
5 developed into an outer berm surrounding an inner wetland which was
6 subject to tidal flow through the channel between the mainland and the
7 end of the berm. This was the state of the property in 1929 when
8 Harry Dines placed the cabins of his resort upon the natural berm.

9 IV

10 During the 1940's, Island County built a road across the tidal
11 channel near Dines Point thereby cutting off the wetland from the
12 regular ebb and flow of the tide. Because of this the Dines Point
13 lowland is in transition from tidal wetland, which it no longer is, to
14 dry upland, which it is not yet.

15 V

16 Salt waters from Holmes Harbor continue to influence the Dines
17 Point lowland even without the tidal channel. Extreme high tides
18 combined with winter storms move salt water over the top of the berm
19 into the lowland. At these times, the most recent being 1987, the
20 lowland takes on the appearance of a lake. These salt waters permeate
21 the lowland soil and influence vegetation.

1 VI

2 The Dines Point lowland also receives fresh water runoff from
3 steep upland areas adjacent to it. Shallow water seen on the site
4 during a considerable part of the year is probably freshwater runoff.

5 VII

6 The plant community on the lowland requires high salinity and is
7 primarily aquatic or semi aquatic. The predominant plant species are
8 pickleweed (Salicornia virginica), saltbush (Atriplex patula var.
9 hastata), saltgrass (Distichlis spicata), and seaside arrowgrass
10 (Triglochin maritimum).

11 VIII

12 The lowland area serves to some degree as a control against
13 pollution, erosion and flooding and as cover for wildlife. Its value
14 for any of these is relatively minor. However, the loss of a number
15 of such wetland areas could produce a cumulative adverse effect which
16 would be significant.

17 IX

18 After Harry Dines' death in 1960, his widow sold the property to
19 three couples who used it for family gatherings but failed to keep the
20 cabins or the bulkhead in repair. In 1982, appellants Mr. and Mrs.
21 Hastings purchased the property with the intent to bring it back into
22 the family and to build their family home there. The site consists of
23 about 3.5 acres. The central lowland area is about one acre.

X

The shoreline adjacent to the site is now, and for many years has been, developed with residences. A number of these have been constructed with landfill. A number of the nearby homes were constructed before the Shoreline Management Act when the area was chiefly developed.

XI

During March, 1985, Mr. and Mrs. Hastings caused approximately 1600-2000 cubic yards of fill to be placed predominantly in the lowland of their property. This was done at a cost of \$10,000. No shoreline permit was sought nor obtained. All fill was placed within 200 feet of the ordinary high water mark.

XII

Upon learning of the landfill, Island County issued an enforcement order requiring the Hastings to apply for a shoreline substantial development permit for the fill. The Hastings did so on June 26, 1985.

XIII

The pertinent portions of the Island County Shoreline Master Program (ICSMP) in this case are:

1. The site and adjacent shoreline are designated as "shoreline residential." ICSMP Shoreline Atlas No. 23.
2. Single family residences are a permitted, primary use in the "shoreline residential" environment. ICSMP Sec. 16.21.035(c)(1), page 5.
3. Landfill is a permitted, secondary use in the "shoreline residential" environment. ICSMP Sec. 16.21.035(c)(2), page 5.

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FINAL FINDINGS OF FACT

CONCLUSIONS OF LAW & ORDER

(5)

- 1 4. Landfill shall be permitted only in conjunction
2 with shoreline - dependent uses. ICSMP Sec.
3 16.21.075(B)(1), page 14.
4 5. Landfill shall not be permitted in estuaries,
tidelands, marshes, ponds, swamps or similar water
retention areas. ICSMP Sec. 16.21.075(B)(2), page 14.

5 XIV

6 The criteria for permitted, secondary uses such as landfill in
7 this case are:

- 8 a) The proposed use will not be contrary to the
9 general intent, purposes, goals, or policies of
10 Island County's Master Program;
11 b) The use will not be contrary to the definition
12 and policies expressed for the particular
13 shoreline designation within which it is located;
14 c) The use will not unduly interfere with public use
15 of publicly-owned land or private use of adjacent
16 private land;
17 d) The use will cause no unnecessary adverse effects
18 on the environment or impact other uses;
19 e) Location, design, construction, and operation of
the proposed use shall comply with the use
requirements specified in Chapter 17.20 for that
type of development.

19 XV

20 Respondent, Washington State Department of Ecology (DOE) has
21 adopted the following regulation defining marshes, bogs and swamps
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1 (WAC 173-22-040(3)):

2 (3) Marshes, bogs and swamps. If marshes, bogs and
3 swamps which constitute associated wetlands extend more
4 than two hundred feet beyond the ordinary highwater
5 mark of the body of water with which they are
6 associated, their perimeters shall be the outer limit
7 of the wetland designation. Such marshes, bogs and
8 swamps shall be defined and designated according, but
9 not limited to, the following definitions:

10 (a) Marsh - A low flat area on which the vegetation
11 consists mainly of herbaceous plants such as cattails,
12 bulrushes, tules, sedges, skunk cabbage, and other
13 aquatic or semi-aquatic plant. Shallow water usually
14 stands on a marsh, at least during a considerable part
15 of the year. The surface is commonly soft mud or muck.

16 (b) Bog - A depression or other undrained or poorly
17 drained area containing, or covered with, peat (usually
18 more than one layer) on which characteristic kinds of
19 sedges, reeds, rushes, mosses, and other similar plants
20 grow. In the early stages of development the
21 vegetation is herbaceous and the peat is very wet. In
22 middle stages the dominant vegetation is brush. In
23 mature stages trees are usually the dominant
24 vegetation, and the peat, at least near the surface,
25 may be comparatively dry.

26 (c) Swamp - A swamp is similar to a marsh except
27 that reeds and shrubs comprise the characteristic
vegetation. Marshes and swamps merge into each other,
and both tend to merge into bogs.

17 This version of the regulation was adopted in 1980, and was in effect
18 at the time of the Hastings permit application in 1985. A related
19 rule of DOE provides that this criteria governs should there be
20 conflict between it and maps bearing wetland designations. WAC
21 173-22-055.

XVI

The U.S. Army Corps of Engineers (COE) administers a federal wetlands protection program under Sec. 404 of the federal Clean Water Act. This program requires a federal permit for filling natural wetlands. In aid of their jurisdiction, the COE visited the Hastings site after becoming aware of the fill there. The COE determined that the fill straddled the border of the natural lowland on the Hastings property. The COE placed the border of the Hastings lowland, in the vicinity of the fill, on a line extending eastward from a bush located landward of the northeast corner of the dilapidated boathouse on the property. See Exhibit R-1. This places the border about 20 feet landward of the row of existing cabins. That border determination is the most accurate available due to the fact that fill was placed without prior government inspection or approval. Hereafter this border determination shall be referred to as the "COE line".

XVII

On April 10, 1986, the Island County Hearing Examiner issued a Revised Findings and Decision granting the Hastings a shoreline substantial development and conditional use permit. Conclusion of Law 10 (page 6) of that decision states:

10. Landfill is a secondary use in the shoreline residential environment. The amount of landfill in place does not comply with the use requirements under Chapter 16.21 ICC for landfill. Landfill may only be

1 permitted in conjunction with a shoreline dependent
2 use. Landfill may not be permitted in a marsh area.
3 Since single-family residences are a primary use in the
4 Residential area, the Master Program requirements for
5 landfill (ICC 16.21.075(b)) are interpreted to apply
6 only to landfill that is not necessary for the
7 construction of a single family residence. (Emphasis
8 added.)

9 The decision conditioned approval upon the removal of 400 cubic yards
10 of fill deemed unnecessary for residential construction. The 400
11 cubic yards cited for removal were both within and outside of the
12 lowland as were the 1200-1600 cubic yards which the decision
13 authorized.

14 XVIII

15 By letter of May 14, 1986, respondent DOE disapproved the
16 conditional use permit granted by Island County to the Hastings. Its
17 rationale for disapproval was that the entire fill was a prohibited
18 use.

19 XIX

20 On June 12, 1986, the Hastings requested review from this Board.

21 XX

22 Any Conclusion of Law which is deemed a Finding of Fact is hereby
23 adopted as such. From these Findings, the Board, comes to these
24

1 CONCLUSIONS OF LAW

2 I

3 We review the landfilling at issue for consistency with the Island
4 County Shoreline Master Program and the Shoreline Management Act. See
5 RCW 90.58.140.

6 II

7 Appellants first contend that the landfill at issue does not
8 require a shoreline substantial development permit. We disagree.
9 Filling is a "development" within the meaning of the Shoreline
10 Management Act (SMA). RCW 90.58.030(3)(d). Moreover, the filling
11 development at issue is "substantial" within the meaning of RCW
12 90.58.030(3)(e) of the SMA because its cost or fair market value
13 exceeds \$2,500. Neither does the filling come within the exemptions
14 provided by the SMA at RCW 90.58.030(3)(e). The personal residence
15 exemption from the requirement for a substantial development permit,
16 RCW 90.58.030 (3)(e)(vi), does not include the antecedent fill.¹
17 Whittle v. City of Westport and Bowe, SHB 81-10 (1981) and Department
18 of Ecology v. Clallam County and Myers, SHB No. 159 (1975).

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22 ¹ We are cognizant that DOE has amended, in 1986, its regulation
23 implementing the personal residence permit exemption to embrace
24 "grading which does not exceed 250 cubic yards". This regulation
25 cannot exempt from permit requirements the landfill before us, which
26 is at least 5 times more than the quantity specified in the regulation.

1 Lastly, the entire landfill at issue is upon shorelines of the
2 state (on lands within 200 feet of the ordinary high water mark).
3 Therefore a substantial development permit is required for the
4 landfill.

5 III

6 The applicable definition of "marsh" is that of WAC 173-22-040(3)
7 adopted by DOE in 1980. See Finding of Fact XV, above. However, if
8 DOE's 1986 regulation were applicable the result would be the same.
9 Under either regulation, the Hastings' Dines Point lowland is a marsh.

10 The fill in the marsh is therefore prohibited by Section
11 16.21.075(B)(2) of the ICSMP which provides that landfill shall not be
12 permitted in marshes or similar water retention areas. Massey v.
13 Island County, SHB No. 80-3 (1981), p.7.

14 IV

15 The border of the marsh in the area of the fill is the COE line.
16 See Finding of Fact XVI, above. However, the fill both inside and
17 outside of the marsh is prohibited by Section 16.21.075(B)(1) which
18 allows fill only for shoreline dependent uses. Massey, supra, at pp.6
19 and 8. Residential use, as the Hastings propose, is not a shoreline

1 dependent use.² Id., pp.6-7. The entire fill is therefore
2 prohibited by Section 16.21.075(B)(1) of the ICSMP.
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6 2 As we noted on p. 6 in Massey, supra:
7 Residential use and livestock pasturage use are not shoreline (water)
8 dependent uses since they are not dependent in fact on a shoreline
9 location and since they do not qualify as such under ICSMP Use
10 Requirement 16.21.020(L) which provides as follows:
11

12 WATER DEPENDENT USES: Uses which best serve the
13 general public's need for commerce and navigation, and
14 demonstrate an economic dependence for shoreline
15 location. (Emphasis added)
16

17 and
18

19 Appellant contends that the meaning of "shoreline dependent uses"
20 in section 16.21.075(B)1 is ambiguous and is not synonymous with the
21 term "water dependent uses" which is used in the definition set forth
22 in 16.21.020(L) above. Appellant's contention is clearly negated by
23 the wording in the definition itself. A use which can demonstrate an
24 economic dependence for shoreline location is certainly a "shoreline
25 dependent use." We hold that terms "water dependent use" and
26 "shoreline dependent use" as used by the ICSMP Use Requirements in
27 this case are synonymous. (Emphasis in original).

V

The decision of the Island County Hearing Examiner was incorrect in interpreting the ICSMP prohibitions against marsh filling and filling for homes to apply only to landfill that is not necessary for the construction of a single family residence. Neither designation of single family homes as a primary use nor landfill as a secondary use abridge the necessity of complying with the ICSMP use requirements which contain the cited prohibitions. See Muriel Risk, et al. v. Island County, et al. SHB Nos. 86-49 and 86-50 (1987) concerning the necessity of compliance with both the rules for permitted uses and the use requirements. Neither are the prohibitions against marsh filling and filling for homes inconsistent with uses permitted in the shoreline residential environment. A number of water dependent uses are permitted there. These water dependent uses, if developed outside of marshes, are not subject to the landfill prohibitions. As we noted in Massey, supra:

It is clear that it was intended by the county commissioners of Island County that shoreline landfills be permitted only for shoreline dependent commercial and navigational uses and not for residential uses.

VI

This brings us to the final contention of appellants which is that the ICSMP prohibitions against marsh filling and filling for homes,

1 Sections 16.21.075(B)(1) and (2), are inconsistent with the Shoreline
2 Management Act. We find merit in a portion of this contention.

3 VII

4 The State policy enunciated at RCW 90.58.020 of the SMA provides
5 that:

6 It is the policy of the state to provide for the
7 management of the shorelines of the state by planning
8 for and fostering all reasonable and appropriate uses.

9 The Act then goes on to provide:

10 In the implementation of this policy the public's
11 opportunity to enjoy the physical and aesthetic
12 qualities of natural shorelines of the state shall be
13 preserved to the greatest extent feasible consistent
14 with the overall best interest of the state and the
15 people generally. To this end uses shall be preferred
16 which are consistent with control of pollution and
17 prevention of damage to the natural environment, or are
18 unique to or dependent upon use of the state's
19 shoreline. Alterations of the natural condition of the
20 shorelines of the state, in those limited instances
21 when authorized, shall be given priority for single
22 family residences, ports, shoreline recreational uses
23 including but not limited to parks, marinas, piers, and
24 other improvements facilitating public access to
25 shorelines of the state, industrial and commercial
26 developments which are particularly dependent on their
27 location on or use of the shorelines of the state and
other development that will provide an opportunity for
substantial numbers of the people to enjoy the
shorelines of the state. (Emphasis added).

and further:

Permitted uses in the shorelines of the state shall
be designed and conducted in a manner to minimize,

insofar as practical, any resultant damage to the ecology and environment of the shoreline area and any interference with the public's use of the water.
(Emphasis added).

As noted by the Supreme Court in Department of Ecology v. Ballard Elks 84 Wn. 2d 551, 557, 527 P. 2nd 1121 (1974) this policy:

"...stresses the need that such future development be carefully planned, managed and coordinated in keeping with the public interest."

VIII

Elsewhere in the SMA, as we have seen, there is a permit exemption accorded to personal, single family residences. RCW 90.58.030(3)(e)(vi). Though not applicable to the landfill at issue here, this provision is instructive as to the priority granted by the SMA to the construction of a home for one's own use.

IX

We conclude that the ICSMP prohibition against marsh filling, Section 16.21.075(B)(2), is consistent with the SMA. This prohibits development which, in the words of the SMA policy, may not be "consistent with control of pollution and prevention of damage to the natural environment." It may also be necessary "to minimize, insofar as practical", any resultant damage to the ecology and

1 environment of the shoreline area." In short, it represents planning
2 which can be deemed to be in keeping with the public interest as set
3 forth in Ballard Elks, supra.

4 Therefore, the fill in the marsh (i.e. south of the COE line) is
5 prohibited, and the DOE disapproval should be affirmed under WAC
6 173-14-140 (3) providing that uses which are specifically prohibited
7 by the master program may not be authorized.

8 X

9 It is a different matter, however, as to the ICSMP prohibition of
10 filling for homes, Section 16.21.075(B)(1). We note first that this
11 provision does not prohibit fill, per se. Indeed, fills for water
12 dependent commercial or navigational uses are not prohibited by this
13 rule. The provision in question would allow landfill for water
14 dependent uses outside of marshes (or apparently landward of ordinary
15 high water) where the statutory "wetlands" may, indeed, be dry. Such
16 filling could be deemed consistent with the SMA policies for
17 prevention of damage to the natural environment or to minimize damage
18 to the shoreline area. However, we deem the rule to be inconsistent
19 with the SMA where, as here, it does not prohibit landfill for water -
20 dependent commercial uses but does prohibit, in the same location,
21 landfill for the construction of a single family home for one's own
22 use in a shoreline residential area. Such a prohibition does not
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1 rest upon environmental harm, nor was an environmental issue raised
2 as to the fill lying outside the marsh. Rather, such a prohibition
3 impermissibly subjugates the owner - built single family residence
4 which enjoys priority that is equal to that of water dependent
5 commercial uses. See RCW 90.58.020 cited at Conclusion of Law VII and
6 RCW 90.58.030(3)(e)(vi) cited at Conclusion of Law VIII, above.
7 Compare Massey, supra, which involved the proposal to place fill for
8 two homes not for the builder's own use.

9 The ICSMP rule, Section 16.21.075(B)(1), as applied to the portion
10 of the fill north of the COE line is inconsistent with the SMA and to
11 that extent is invalid. That fill meets the secondary use criteria
12 set out for landfill (see Finding of Fact XIV, above) and the
13 shoreline substantial development permit should be remanded to Island
14 County for re-issuance accordingly. The DOE disapproval should be
15 reversed in this regard because no conditional use permit is required.

16 XI

17 Lastly, the impropriety of the ICSMP rule prohibiting fill for
18 homes is inseparable from the chronology in which rule making has
19 occurred. When the ICSMP rule was adopted in 1975, the variance rule
20 of DOE allowed prohibited uses to be varied. See La Valley v. DOE SHB
21 No. 78-7 (1978) and Miller v. DOE SHB No. 78-9 (1978). Later,
22 however, DOE amended its rules to prohibit varying a prohibited use.

1 WAC 173-14-140 and 150. We affirmed this amended DOE rule on appeals
2 by both the City of Seattle and the City of Tacoma. Seattle v.
3 DOE, SHB No. 78-21 (1978). In so doing, however, we emphasized the
4 importance of reviewing the uses which were prohibited at the time of
5 DOE's rule change. We held in Seattle v. DOE:

6
7 If a use, which is reasonable and appropriate under
8 certain conditions, is deemed a prohibited use, such
9 classification may violate the policy of the SMA "to
10 provide for the management of the shorelines of the
11 state by planning for and fostering all reasonable and
12 appropriate uses." To do otherwise would thwart the
13 policy of RCW 90.58.020. RCW 90.58.100(5). In view of
14 DOE's new rules, uses prohibited under a master program
15 may require re-evaluation to ensure that any hardships
16 suffered are necessary and are a valid exercise of
17 state police power. (Emphasis added).

18
19 Both Island County and DOE should review the ICSMP to assure that the
20 combination of a pre-1978 prohibited use with DOE's post - 1978³
21 rule do not operate in tandem to thwart the SMA.

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27 ³ Although not raised here, the propriety of the post 1978 DOE rule
may one day need to be revisited.

XII

In summary, the fill placed by the Hastings north of the COE line is lawful. The fill placed south of the COE line is in a marsh and unlawful. Although ancillary to a constitutional taking issue over which we have no jurisdiction, we would conclude that this disposition of the case leaves the appellants, Mr. and Mrs. Hastings, with a reasonable use of their property for residential purposes.

XIII

We reach no conclusion as to the ability of the site to accomodate a septic system. In the context of this owner-built single family residence this is better left for resolution under the county health code following an actual septic system proposal.

XIV

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law the Board enters this

ORDER

The disapproval by Department of Ecology of the shoreline permit granted by Island County to Mr. and Mrs. Hastings is affirmed except as to the fill north of the COE line as to which the Department's disapproval is reversed and the shoreline substantial development permit is hereby remanded to Island County for a reissuance which authorizes fill north of the COE line.

DONE at Lacey, Washington this 8th day of March, 1988.

SHORELINES HEARINGS BOARD

Wick Dufford
WICK DUFFORD, Chairman

Lawrence J. Faulk 3/3/88
LAWRENCE J. FAULK, Member

Judith A. Bendor
JUDITH A. BENDOR, Member

Nancy Burnett
NANCY BURNETT, Member

Thomas R. Cowan
TOM COWAN, Member

William A. Harrison
WILLIAM A. HARRISON,
Administrative Appeals Judge

Ronald T. Bailey
RONALD T. BAILEY, Member

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